

\*\*E-Filed 1/6/06\*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JACK SHIEH,

Plaintiff,

v.

KUMON NORTH AMERICA, INC.,

Defendant.

Case Number C 05-5285 JF (HRL)

ORDER DENYING APPLICATION  
FOR TRO AND FOR ORDER TO  
SHOW CAUSE RE PRELIMINARY  
INJUNCTION

[Docket No. 6]

Plaintiff Jack Shieh (“Shieh”) seeks a temporary restraining order (“TRO”) prohibiting Defendant Kumon North America, Inc. (“Kumon”) from terminating Shieh’s franchises and notifying Shieh’s customers of the termination. Shieh also seeks an order to show cause why a preliminary injunction should not issue. The Court has considered the briefing as well as the oral arguments presented at the hearing on January 6, 2006.<sup>1</sup> For the reasons discussed below, the applications will be denied.

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<sup>1</sup> In its scheduling order of December 30, 2005, the Court granted Shieh leave to file a reply brief by 5:00 p.m. on January 4, 2006. Shieh did not file a reply brief.

## I. BACKGROUND

Kumon is a franchisor that offers a proprietary method used in its after-school learning centers. Shieh, one of Kumon's franchisees, operates two after-school learning centers in Santa Clara County. In June 2004, Kumon learned from a televised news report that Shieh had been arrested for inappropriately touching a child enrolled in one of Shieh's franchised learning centers. Shieh was charged with a violation of California Penal Code § 647.6(a) (annoying or molesting a child under the age of eighteen). The franchise agreements between Kumon and Shieh expressly provide for automatic termination of the franchise in the event the franchisee is "convicted, plead[s] guilty to, or plead[s] no contest to a crime involving moral turpitude, a crime against children under the age of eighteen, or a felony." Franchise Agmts ¶ 15.3(c). Kumon contacted Shieh to discuss the matter; the parties agreed that Shieh would not personally participate in the operation of the franchises while the criminal charges were pending, and that Shieh's wife would take over actual operation of the centers during this interim period.

In May 2005, Shieh pled no contest to a violation of California Penal Code § 242 (battery) with respect to the child. He was sentenced to one year of probation and thirty hours of psychiatric counseling, and a monetary fine was imposed but stayed. Shieh did not inform Kumon of his conviction. On September 2, 2005, Shieh sent two Kumon employees an email stating that "[a]s we discussed on the phone, my case of being wrongly accused is over."<sup>2</sup> Shieh email of 9/2/05. The email further stated that Shieh had been "working" again, had been welcomed back by students and parents and had obtained some new students. Kumon referred the matter to its legal department for investigation. *Id.* In early December, 2005, Kumon obtained court records reflecting Shieh's plea and sentence. Shortly thereafter, Kumon sent Shieh a letter terminating his franchises effective December 30, 2005. Kumon also notified the parents of the students enrolled at Shieh's franchises that those franchises would be closed and that students could enroll in a nearby Kumon center at no additional charge.

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<sup>2</sup> The record does not contain any information as to what was said during the referenced telephone conversation.

Shieh filed the instant action for injunctive and declaratory relief in the Santa Clara Superior Court on December 19, 2005. Kumon removed the action to this Court on the basis of diversity jurisdiction on December 21, 2005. The action was assigned to the undersigned on December 22, 2005.

## II. DISCUSSION

The standard for issuing a TRO is the same as that for issuing a preliminary injunction. *Brown Jordan International, Inc. v. Mind's Eye Interiors, Inc.*, 236 F. Supp. 2d 1152, 1154 (D. Hawaii 2002); *Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co.*, 887 F.Supp. 1320, 1323 (N.D. Cal. 1995). In the Ninth Circuit, a party seeking a preliminary injunction must show either (1) a likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits and the balance of hardships tipping in the movant's favor. *Roe v. Anderson*, 134 F.3d 1400, 1401-02 (9th Cir. 1998); *Apple Computer, Inc. v. Formula Int'l, Inc.*, 725 F.2d 521, 523 (9th Cir. 1984). These formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. *Roe*, 134 F.3d at 1402.

Shieh asserts a single claim for declaratory relief, requesting an adjudication that Kumon is obligated to allow Shieh to transfer his franchises to his wife or, alternatively, to give Shieh a reasonable time to find a third party buyer. While the franchise agreements do provide that a franchisee may transfer a franchise if the transferee meets specified requirements and Kumon consents to the transfer, the franchise agreements do *not* provide an *absolute right* to transfer the franchises as argued by Shieh. See Franchise Agmts ¶ 18. Moreover, the franchise agreements expressly provide for *automatic termination of the franchises without notice or right to cure* in the event that Shieh pleads no contest to a crime against a child under the age of eighteen. Franchise Agmts ¶ 15.3(c). It is undisputed that Shieh in fact pled no contest to battery of a child under the age of eighteen. Based upon this record, the Court concludes that Shieh has not demonstrated a likelihood of success on his declaratory relief claim or serious questions going to the merits of that claim.

During oral argument, Shieh's counsel argued that Kumon waived its contractual right to

1 terminate Shieh's franchises by delaying for several months after receiving Shieh's September 2  
2 email.<sup>3</sup> When the Court clarified that Shieh's email indicated that the criminal charges had been  
3 resolved in his favor, and that Kumon had no actual knowledge of the conviction until December  
4 2005, Shieh's counsel argued that Kumon was on inquiry notice as of receipt of Shieh's email  
5 and thus should have discovered the conviction at that time. This argument is not persuasive, nor  
6 is it supported by any legal authorities cited in Shieh's brief.

7 Shieh's counsel also argued that under California Business & Professions Code §  
8 20021(i), Kumon was required to give notice of the termination notwithstanding the contractual  
9 provision for automatic termination without notice. It is unclear whether California law applies,  
10 because the franchise agreements specify application of New Jersey law, although the agreements  
11 also permit application of the law of the state in which the franchise is located under certain  
12 circumstances. Franchise Agmts ¶ 21.1.<sup>4</sup> Even assuming that California law applies, § 20021  
13 provides for "immediate notice of termination without an opportunity to cure" in the event that  
14 the franchisee "is convicted of a felony or any other criminal misconduct which is relevant to the  
15 operation of the franchise." Cal. Bus. & Prof. Code § 20021(i). Kumon in fact did give notice of  
16 the termination to Shieh almost immediately upon discovering that he had been convicted of  
17 battery upon a child.

18 Moreover, Shieh has failed to demonstrate that he is likely to suffer irreparable injury or  
19 that the balance of hardships tip in his favor. Any injury flowing from Kumon's alleged breach  
20 of its obligations to permit Shieh to transfer his franchises is compensable by monetary damages.  
21 There is no evidence that Kumon is insolvent or otherwise unable to pay monetary damages in  
22 the event that Shieh prevails.

23 Accordingly, the application for TRO will be denied, as will the application for an order  
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25 <sup>3</sup> Counsel stated that the email was sent in July 2005, but the email submitted by Kumon  
26 as exhibit 2 to Rachel Levine's declaration is dated September 2, 2005.

27 <sup>4</sup> The franchise agreements also provide that any litigation filed by a franchisee against  
28 Kumon must be filed in New Jersey. Franchise Agmts ¶ 21.2. To date, Kumon has not asserted  
this provision as a defense to Shieh's action or moved to transfer the action to New Jersey.

1 to show cause why a preliminary injunction should not issue.

2 **III. ORDER**

3 Plaintiff's applications for a TRO and for an order to show cause why a preliminary  
4 injunction should not issue are DENIED.

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11 DATED: 1/6/06

12 /s/ electronic signature authorized

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14 JEREMY FOGEL  
15 United States District Judge  
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